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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Consumers Union, *et al.*,	)	
Requesting Amendment of the	)	RM Docket No. 9167
Commission's Rules to Update	)	
Cable Television Regulations and	)	
Freeze Existing Cable Television Rates	)	

To: The Commission

RESPONSE OF VIACOM INC.

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October 30, 1997

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RESPONSE OF VIACOM INC.

Viacom Inc. ("Viacom"), by its attorneys, hereby responds to the above-referenced petition of Consumers Union and the Consumer Federation of America calling for, *inter alia*, a freeze on cable rates and a revamping of the Commission's framework for rate regulation.[1] Viacom opposes constricting the Commission's long-considered rate regulations, or expanding the scope of the program access rules, because any such change would hamper the creation and distribution of programming.[2] Allowance for the continuing growth of investment in programming is not a loophole in—but rather an essential goal of—FCC cable regulation.

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[1] *See* FCC Public Notice, Report No. 2230 (Sept. 30, 1997) (inviting comments on Petition of Consumers Union and Consumer Federation of America ("CU/CFA Petition")).

[2] Viacom, through affiliates, owns and operates the premium program services Showtime, The Movie Channel, and FLIX; and the basic program services Nickelodeon/Nick at Nite; MTV: Music Television; VH1/Music First; TV Land; and M2: Music Television. Viacom, through affiliates, also holds partnership interests in Sundance Channel, Comedy Central, and All News Channel.

Programming is but one of a number of different factors that may contribute to upward pressure on cable rates, yet programming could bear perhaps the most immediate and direct effects of a rate freeze. A freeze would foreclose external cost treatment for program expenses and thus cap further operator investment in programming. The license fees that cable operators pay for program services are crucial to most programmers, particularly independent programmers such as Viacom, which depend greatly on the quality of their programming to overcome challenges to gaining and maintaining carriage on capacity-constrained cable systems.

As for any call to extend program access regulation to independent programmers, Viacom notes that it makes its established services—including all those that competitors to incumbent cable operators concede to be their real exclusivity concerns—available to all distribution technologies. As explained below, however, imposition of the program access rules on non-vertically integrated programmers would arrest the growth of new networks that such programmers seek to offer.

The Commission knows well that, to most consumers, programming is the reason that the cable industry exists. Even the petitioners' own expert recognizes that viewers' "strong demand for entertainment, news, information, and sports" is the driving force behind the medium.[3] In implementing the statutory directives for cable regulation, the Commission has always sought to avoid imposing rules that would discourage operators from investing in the programming that best responds to consumer demands. Petitioners have provided no basis for changing course now.

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[3] Statement of Dr. Mark Cooper at 8 (appended to CU/CFA Petition).

I. THE COMMISSION SHOULD NOT CONSTRICT ITS RATE REGULATION FRAMEWORK BECAUSE SUCH ACTION WOULD JEOPARDIZE ITS LONG-STANDING GOAL OF FOSTERING INVESTMENT IN PROGRAMMING

Whatever forces might contribute to upward pressure on cable rates, rate trends cannot be traced to one source alone. Cable operators have indicated that their responses to competitive pressures include an array of pro-consumer, if still costly, actions.[4] Investments in system upgrades allow cable operators to provide more channels, clearer picture and sound, and improved customer service. License fee support for new and existing networks, in turn, allows cable operators to offer a broadened mix of quality programming fare. The consequences of a rate freeze thus would be directly at odds with the regulatory goal of encouraging, rather than retarding, program development.

Since the inception of its efforts to implement the Cable Television Consumer Protection and Competition Act of 1992, the Commission has worked to ensure that its rate regulations do not "inadvertently harm the continued ability of programmers to develop and produce programming."[5] The Commission therefore determined that external cost treatment was justified in order to "permit operators to recover fully programming expenses."[6] The same concerns

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[4] *See* Comments of National Cable Television Association, CS Docket No. 97-141 (filed July 23, 1997) (annual video competition proceeding).

[5] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5787 (1994) ("*Rate Order*").

[6] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 9 FCC Rcd 4119, 4234 (1994) ("*Second Reconsideration Order*"); *see also, e.g., Rate Order*, 8 FCC Rcd at 5787-88. In explaining her support for the "going forward" rules, Commissioner Ness stated that the revised regulatory regime was tailored so as "not [to] stifle the production of quality new program networks. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd. 1226, 1330 (1994) ("*Sixth Reconsideration Order*")

(Continued...)

motivated the Commission to provide affirmative incentives to encourage cable operators to increase their investment in programming, whether provided on additional channels or existing networks.[7]

A rate freeze, even if temporary, would operate as an effective denial of the external cost "pass-through" treatment long accorded to programming—with the obvious result that programming investment, too, would be frozen in place or even decline over the duration of the restriction. The CU/CFA Petition offers no pro-competitive justification to warrant the imposition of sweeping new restraints on programming across the board.

The Commission's "going-forward" policies have been essential to encourage investment in independent and, indeed, all program services, and the benefits to consumers are measurable. The agency's latest video competition analysis confirms that the cable industry is offering more channels, providing a greater number of individual program services, and attracting higher audience levels than ever before.[8] Original programming especially has been recognized as a crucial component for enticing and keeping viewers, and programmers seeking to build and maintain distribution on capacity-tight cable systems are responding accordingly.[9]

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(Separate Statement of Commissioner Susan Ness).

[7] *See Second Reconsideration Order*, 9 FCC Rcd at 4139 (7.5 percent mark-up for license fee increases for existing channels); *Sixth Reconsideration Order*, 10 FCC Rcd at 1251 (20-cent mark-up for new channels).

[8] *See Third Annual Video Competition Report*, 12 FCC Rcd 4358, 4368 (1997). Television ratings reveal that non-broadcast cable programming is capturing an aggregate 30 percent of TV viewers. *Id.* at 4369.

[9] "[C]able networks clearly are increasing the number of original movies or shows they produce or buy. . . . Programming executives are convinced that they need big original movies
(Continued...)

Consequently, the Commission is presented with no cause to revise, even indirectly through a freeze, its current treatment of programming costs under its rate regulations. To the contrary, with the impending lapse of the per-channel incentives for adding new programming services, the Commission, if anything, should instead consider how best to maintain appropriate incentives to encourage operators to invest in programming offered by newly added program services.

II. THE COMMISSION SHOULD ONCE AGAIN REJECT ANY CALL FOR EXTENSION OF THE PROGRAM ACCESS RULES TO INDEPENDENT PROGRAMMERS

As with new rate constraints, restrictions on possible distribution strategies for independent programmers can only discourage investment in, and the viability of, such services. Although the petitioners focus mainly on issues raised in this context by vertical integration, they also take note of certain exclusivity agreements between cable operators and independent programmers.[10] Yet even petitioners appear not to use this reference as a basis for claiming that any exclusivity agreement with an independent program service would necessarily foreclose competition. The Commission, in any event, should reject any attempts to recast this reference as a serious call for extending program access restrictions to non-vertically integrated programmers.[11]

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and series to establish a unique identity for a network. A breakthrough show or event is a must for a network that's trying to hook channel surfers and promote the rest of its schedule." John Higgins, *Big-Ticket Originals Pay Off For Cable*, Broadcasting and Cable, Oct. 20, 1997, at 29.

[10] CU/CFA Petition at 17.

[11] The Commission already has considered and rejected such arguments in the past. *See, e.g., Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and*
(Continued...)

As Viacom has noted before, the program access rules were designed to constrain the perceived power of cable operators to impede the development of rival distributors—not to regulate programming *per se*.[12] Viacom also has previously explained how extending program access regulation to non-vertically integrated programmers actually would impede competition by cutting short investment to develop new program services.[13] It is widely understood that capacity constraints confronting many cable systems have checked the growth of new program services. In certain instances, new networks may find exclusivity key to obtaining both the carriage and promotional support necessary to make their services viable.[14]

Furthermore, recent congressional testimony confirms that sweeping claims for broader program access obligations are founded on unsubstantiated fear about the future, rather than fact. The fact is that Viacom makes all of its established services available to all distribution technologies. As noted in a trade press article about a recent hearing of the Senate Judiciary Committee's Subcommittee on Antitrust, Ameritech New Media President Deborah Lenart has conceded as much.[15] Indeed, Viacom has every reason to seek as many distributors as possible

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Competition Act of 1992, 8 FCC Rcd 3359, 3384 (Apr. 30, 1993).

12 *See, e.g.*, Reply Comments of Viacom Inc., CS Docket No. 95-61 (filed July 28, 1995); Reply Comments of Viacom Inc., RM Docket No. 9097 (filed July 17, 1997); Comments of Viacom Inc., CS Docket No. 97-141 (filed Aug. 20, 1997) ("Viacom Competition Comments").

13 *See, e.g.*, Viacom Competition Comments at 5-6.

14 *See id.* at 5.

15 As reported in Broadcasting & Cable magazine:

> ... Lenart admitted that it is not the unavailability of [Viacom's new service] TV Land that worries her, but "the precedent it sets. If TV Land is

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for its program services. Yet if a well-known and successfully proven programmer such as Viacom nonetheless finds that limited use of exclusivity might sometimes be required to launch new networks such as TV Land, the same business considerations certainly confront smaller, less established independent programmers. Therefore, any proposed untethering of program access obligations from their vertical integration rationale could well choke off the development of independent programmers. Such a result would hardly serve the petitioners' stated goals, much less the public interest.

(...Continued)
held exclusively, then a precedent exists for Nickelodeon to be held exclusively."

But when asked whether Viacom's mature cable networks, and specifically Nickelodeon, are kept from Ameritech New Media, Lenart said: "Nickelodeon is available to us today."

Paige Albiniak, *Congress Eyes Cable*, Broadcasting & Cable, Oct. 13, 1997, at 43.

III. CONCLUSION

For the foregoing reasons, Viacom urges the Commission to reject calls for any new regulatory constraints—both as to rate and program access regulation—that would impede continued and growing investment in quality programming.

Respectfully submitted,

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October 30, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 1997, I caused copies of the foregoing Response of Viacom Inc. to be mailed via first-class postage prepaid mail to the following:

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